NO. 79-1144

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TEXAS INDUSTRIES, INC.,

Petitioner

VERSUS

RADCLIFF MATERIALS, INC., JIMCO, INC.
and OKC DREDGING, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER
TEXAS INDUSTRIES, INC.

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BRIEF FOR PETITIONER 2/
TEXAS INDUSTRIES, INC.

QUESTION PRESENTED

Whether a defendant in a Federal Antitrust case may seek contribution.

1/ The plaintiff in this matter, Wilson P. Abraham Construction Corporation, is not a party to the matter before the Court.

2/ In accord with Rule 28.1 of this Court, the following lists subsidiaries (other than those wholly owned) and affiliates of Texas Industries, Inc.:

Chaparral Steel Company

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STATUTORY PROVISIONS

The pertinent statutes involved are Section 1 of the Sherman Act, 15 U. S. C. 1 and the Clayton Act, 15 U. S. C. 15.

15 U. S. C. 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U. S. C. 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in ***Wilson P. Abraham Construction Corp. v. Texas***

Industries, Inc. (hereafter *Abraham*) is reported at 604 F. 2d 897. The opinion of the United States District Court for the Eastern District of Louisiana, which was unpublished, appears in Joint Appendix page 46. Application for rehearing was denied on November 29, 1979.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 26, 1979. The Petition for Certiorari was filed January 24, 1980 and was granted November 3, 1980. This Court's jurisdiction is invoked under 28 U. S. C. 1254(1).

STATEMENT OF THE CASE

History of the Litigation and Course of Proceedings

Petitioner and respondents are manufacturers of ready-mix concrete in New Orleans, Louisiana.

On January 26, 1973, a grand jury sitting in the United States District Court, Eastern District of Louisiana, handed down criminal indictments charging petitioner, Texas Industries, Inc. and one of its employees, respondent Radcliff Materials, Inc. and one of its employees, respondent Jahncke Services, Inc. and one of its employees, and respondent Jimco, Inc. with violations of 15 U. S. C. 1. The indictments charged the existence of an unlawful combination and conspiracy in unreasonable restraint of interstate trade consisting of an agreement between the defendants to raise and stabilize the price of ready-mix concrete in the New Orleans area. The criminal proceedings were ultimately concluded with convictions based upon *nolo contendere* pleas by each of the defendants.

On September 8, 1975, Wilson P. Abraham Construction Corporation instituted this action against petitioner, Texas

Industries, Inc. and Frank T. Dooley, one of the petitioner's former employees. 3/ The complaint, Joint Appendix page 1, alleged antitrust violations by petitioner and its alleged co-conspirators.

More specifically, the Complaint alleges a violation of the Sherman Act, 15 U. S. C. 1, consisting of a continuing agreement among petitioner, Dooley and their co-conspirators to raise and stabilize the price of ready-mix concrete in the New Orleans area.

Interrogatories filed by petitioner, and answers thereto, revealed that the unnamed alleged co-conspirators included Jimco, Inc., Radcliff Materials, Inc. and Jahncke Services, Inc. Petitioner thereafter filed a third-party complaint naming Jimco, Inc., Radcliff Materials, Inc. and OKC Dredging, Inc. as third-party defendants. In the third-party complaint, Texas Industries sought contribution from the third-party defendants in the event it was found liable to Wilson P. Abraham Construction Corporation in the main demand.

Each of the third-party defendants filed motions pursuant to Federal Rule 12(b) (6) seeking dismissal of the third-party complaint contending that no right of contribution exists among alleged antitrust co-conspirators under the antitrust laws of the United States.

Disposition in District Court

The District Court entered a Minute Entry on October 4, 1977 (Joint Appendix page 46) granting the motions to dismiss filed by the third-party defendants and, on March 29, 1978, the

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3/ Frank T. Dooley has never been served with the Complaint and has never made an appearance.

Court entered an order expressly determining that there was no just reason for delay in the entry of judgment until final determination of all issues in this action, and directing the Clerk to enter the October 4, 1977 Minute Entry as a final judgment. In accord with the said March 29, 1978 order, final judgment was entered on March 29, 1978 dismissing Texas Industries' third-party complaint with prejudice.

Disposition in the Fifth Circuit

On April 5, 1978, Texas Industries timely filed its Notice of Appeal from the judgment of the District Court.

On October 16, 1979, the Fifth Circuit handed down its opinion affirming the District Court's dismissal of petitioner's third-party complaint and holding that no right to contribution exists under the Federal antitrust laws. A petition for rehearing was denied on November 29, 1979, and judgment of the Fifth Circuit was entered on December 26, 1979 (Joint Appendix page 50).

SUMMARY OF ARGUMENT

In order to further the purposes of the antitrust laws, this Court has the power to and should apply federal common-law principles and permit contribution in antitrust cases. This Court has previously recognized that fundamental fairness requires that one wrongdoer should not be compelled to pay all of the damages caused by concurrent actions. That equitable principle should be equally applicable in the context of the antitrust laws, where damages sustained by a plaintiff are trebled, and particularly, where liability is founded on Section 1 of the Sherman Act, which requires a concert of action before a violation thereof can be had.

Contribution has been almost universally accepted by the lower courts in all areas of federal law, including statutes that do not expressly provide for contribution. Fundamental fairness has been the principal reason behind recognition of this remedy.

Contribution will further the objectives of the antitrust laws. Recognition of this remedy will deter future violation of the antitrust laws by guaranteeing that those whose joint action brought about the plaintiff's injuries will be forced to share in the payment thereof. It will avoid circumstances where, through the plaintiff's whim or collusive actions, the entire burden would otherwise be placed on less than all of the violators. Contribution will also ensure that none will keep the fruits of their illegal activities. Without a rule permitting contribution, there will be no method by which those not sued by the plaintiff can be forced to share in the payment of damages caused by their joint participation in an illegal scheme, thus thwarting, in such cases, clear Congressional intent.

Contribution can be applied in such a fashion to encourage and finalize settlements. This remedy will not complicate the plaintiff's case and will not inject new issues or require the introduction of new evidence into already complex litigation.

Evidence presented by the plaintiff to establish liability and injury will be sufficient evidence on which to establish standards for applying contribution.

The remedy of contribution is consistent with the purposes of the antitrust laws, encourages competition while discouraging antitrust violations, and permits the courts to apply equitable principles of fairness between the parties.

ARGUMENT

The issue before the Court is whether defendants in antitrust cases may assert claims for contribution. Three Circuit Courts have addressed this issue. 4/ Many commentators have likewise focused on the question. 5/ All seem to approach it in the framework of whether there should be contribution, and varying views have been expressed. When a question of such fundamental fairness is considered, however, the more appropriate way to confront the problem should be to ask why should it *not* be a recognized remedy. When viewed in that light, with the compelling arguments hereafter stated, we suggest that only when a right to contribution is recognized among antitrust offenders can basic constitutional principles of fairness be achieved.

I. THE COURT HAS THE POWER TO RECOGNIZE CONTRIBUTION UNDER THE ANTITRUST LAWS

In recognizing a right to contribution under the antitrust laws, this Court would not thereby create a new cause of action. Congress intended that all who violated the antitrust laws pay the consequences of their illegal acts. Thus, contribution merely enables the courts to divide this liability among all of those

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4/ In addition to the Fifth Circuit's decision in this case, see *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979) and *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1977-2 Trade Cases (CCH) ¶61, 698 (D. Utah 1977), affirmed, 1979-2 Trade Cases (CCH) ¶62,995 (10th Cir. 1979), *en banc rehearing granted and pending* Dec. 27, 1979).

5/ E. g., Jacobson, Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem, 32 U. Fla. L. Rev. (1980) (to be published); Schwartz, Simpson & Arnold, Contribution in Private Actions Under the Federal Antitrust Laws, 32 S. W. L. J. 779 (1979); Note, Contribution and Antitrust Policy, 78 Mich. L. Rev. 892 (1980); Note, Contribution in Private Antitrust Actions, 93 Harv. L. Rev. 1540 (1980).

intended by Congress to bear it.

The Court has often recognized the power of the federal judiciary to supplement express remedies. For example, in *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U. S. 448 (1957) the question was whether the federal courts had the power, under the Labor Management Relations Act of 1947, to compel an employer to comply with certain contractual grievance arbitration provisions. With the purpose of effectuating the Act's policy in mind, the Court recognized the federal courts' power to compel arbitration and, in so doing, observed that:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id. at 457.

In *Illinois v. City of Milwaukee, Wisconsin,* 406 U. S. 91 (1972), the State of Illinois filed a motion to file a complaint under the Court's original jurisdiction against four Wisconsin cities and certain city commissions seeking to abate pollution of Lake Michigan. Discussing the scope of remedies under the Federal Water Pollution Control Act, the Court said:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available.

> 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' ***Textile Workers v. Lincoln Mills,*** 353 U. S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as ***Texas v. Pankey***, 441 F. 2d 236, recently held.
>
> The application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act.

Id. at 103, 104 (footnote omitted). Similar Court action appears in ***Wyandotte Transportation Co. v. United States,*** 389 U. S. 191 at 200-201 (1967), ***Sullivan v. Little Hunting Park, Inc.,*** 396 U. S. 229, 239 (1969), and ***United States v. Republic Steel Corp.,*** 362 U. S. 482 (1960).

The antitrust laws are an area of special federal concern and clearly this Court has the power to recognize the right to contribution. Although the right to contribution is not specifically mentioned in the antitrust laws, liability under those laws is determined in conjunction with common-law principles:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

National Society of Professional Engineers v. United States, 435 U. S. 679, 688 (1978) (footnote omitted).

It has also been observed that "Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case." ***United States v. Associated***

Press, 52 F. Supp. 362, 370 (S. D. N. Y. 1943), *affirmed*, 326 U. S. 1 (1945).

The courts have frequently resolved issues under the Sherman and Clayton Acts through exercise of federal common-law powers. They have applied principles of joint and several liability to the antitrust laws, recognizing violators to be joint tortfeasors. *City of Atlanta v. Chattanooga Foundry & Pipe-works*, 127 F. 23, 26 (6th Cir. 1906), *affirmed*, 203 U.S. 390 (1906); *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 330 (1955). Federal common law was applied to determine the effect of a release under the antitrust laws, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U. S. 321, 343-48 (1971), and was discussed by the Court while considering *in pari delicto* as a defense in federal antitrust actions, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134, 137-40 (1968).

This Court has stated:

> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted.

Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176 (1942).

Since there is nothing in the legislative history of the Sherman Act or the Clayton Act to indicate that Congress considered whether contribution was available to defendants in antitrust actions, the issue should be decided by this Court.

Petitioner is not asking this Court to imply a new private cause of action within the meaning of *Cort v. Ash*, 422 U. S. 66 (1975), any more than did the petitioners in *Perma Life*

Mufflers, supra. There, as here, the question was whether the relief requested was necessary to implement the underlying policies of the antitrust laws.

The express policy of the Sherman Act is that "*Every person* who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty . . ." 15 U. S. C. 1 (emphasis added). The Clayton Act, 15 U. S. C. 15, provides civil liability for those acts deemed illegal. It is violation of 15 U. S. C. 1 with which petitioner is charged. Without contribution under facts such as those existing in this case, Congress' intent will be partially thwarted, since "every person", whose joint efforts created liability, cannot in some instances be found liable.

Moveover, as hereafter expressed, without a right of contribution the deterrence objective of the antitrust laws will be lessened, certain willful violators of the laws will keep the fruits of their illegal acts, and, in effect, the pool of private attorneys general will be reduced. 6/

In sum, contribution would not be a new cause of action. It would merely provide a remedy by which full Congressional intent can be achieved. Under the Clayton Act, it is the injured plaintiff who has the express cause of action. Contribution ensures that all of those whom Congress decreed would be liable will share in the payment of plaintiff's injuries.

II. FOR REASONS OF FUNDAMENTAL FAIRNESS, CONTRIBUTION SHOULD BE RECOGNIZED UNDER THE ANTITRUST LAWS

Prohibiting contribution can unjustly place full economic

6/ *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134 (1968).

burden on less than all joint tort-feasors. The effect of such a rule is particularly unjust under the antitrust laws where damages are trebled and where liability under Section 1 of the Sherman Act cannot be assessed in the first place without the act of two or more tort-feasors.

This inequitable and potentially devastating financial burden could be imposed upon less than all participants in an unlawful scheme solely by the random and arbitrary decision of a plaintiff. For example, under the facts of this case, petitioner and respondents were indicted and charged with entering into an unlawful combination in restraint of trade, consisting of an agreement ***between the defendants*** to raise and stabilize the price of ready-mix concrete in New Orleans. All four were convicted on ***nolo contendere*** pleas. Yet, Wilson P. Abraham Construction Corp. sued only Texas Industries, Inc. and thus seeks to impose entire liability on Texas Industries, Inc. - liability that could not be imposed at all without the participation of one or more of the respondents in a scheme found unlawful.

The economic severity of the burden imposed by such a rule could depend solely upon the number of defendants sued or the number against whom the plaintiff chooses to execute. Neither the relevant statutes, nor the legislative history of the Act, nor prior interpretive decisions of the courts suggest that Congress had such an intent. To the contrary, in imposing the requirement that there be an illegal ***combination*** for one to be liable under 15 U. S. C. 1, it seems a logical interpretation that those who combined illegally were to be exposed to the same liability. Principles of fundamental fairness dictate the same conclusion.

Concepts of justice and fairness have been the principal reasons behind the evolution of federal common law on the contribution issue. Today, contribution is available in virtually

every area of federal law. For example, the obvious inequity of the no-contribution law was rejected by this Court in *Cooper Stevedoring Co., In., v. Fritz Kopke, Inc.*, 417 U. S. 106 (1974). The Court, permitting contribution between tort-feasors in maritime non-collision cases to ensure fairness, stated it this way:

> [A] *"more equal distribution of justice"* can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U. S. 111 (emphasis added)

Just last year, in *Edmonds v. Compagnie Generale Transatlantique*, 443 U. S. 256, 271-72, n. 30 (1979), a maritime negligence action, this Court noted the general rule that tort-feasors may normally seek contribution from one another, and observed that "Contribution remedies the unjust enrichment of the concurrent tort-feasor. . . ."

Most other courts have recognized the need for contribution. The Seventh Circuit followed *Cooper Stevedoring* in *Heizer Corp. v. Ross*, 601 F. 2d 330 (7th Cir. 1979), permitting contribution among defendants under the securities laws in order to have "a more equal distribution of justice." *Id.* at 332.

That Court said:

> The policy underlying the securities laws is reinforced by applying contribution. By apportioning the loss among joint wrongdoers the deterrent effect of the judgment is felt by all culpable parties and the protected investor class has available to it a broader source of reimbursement.

Id. at 332.

Contribution has been recognized in civil rights cases, where no statutory right exists. In ***Glus v. G. C. Murphy Co.***, 629 F. 2d 248, at 252 (3rd Cir. 1980), the Third Circuit said that:

> The rule prohibiting contribution has come into disrepute. It is now widely recognized that ***fundamental fairness*** demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants. (emphasis added)

Explaining its reasoning, the Court stated that "the contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby coercing a settlement." *Id.* at 256.

It was also permitted in a mid-air collision case, which the Seventh Circuit said is controlled by federal common law. ***Kohr v. Allegheny Airlines, Inc.***, 504 F. 2d 400 (7th Cir. 1974), ***cert. den.*** 421 U. S. 978 (1975). The Court rejected "as being outmoded and entirely unsatisfactory, the contention that the federal rule should be one of no contribution." *Id.* at 405.

In the only appellate court decision allowing contribution under the antitrust laws, ***Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.***, 594 F. 2d 1179 (8th Cir. 1979), 7/ the Eighth Circuit based its holding squarely on considerations of fairness:

7/ Neither the Fifth Circuit in this case nor the Tenth Circuit in *Olson Farms Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) at 62,995 (10th Cir. 1979) *en banc* rehearing granted and pending (Dec. 27, 1979), addressed the issue of fairness between the parties.

> The deciding factor in our decision is ***fairness between the parties.*** We conclude that fairness requires that the right of contribution exist among joint tortfeasors at least under certain circumstances. There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.

Id. at 1185, 86 (emphasis added).

A rule denying contribution among tort-feasors is patently inequitable. Such a rule is archaic and has no place under the economics of these times. Contribution eliminates concern that either discrimination by a plaintiff, or collusion between the plaintiff and some of the wrongdoers, will operate to shift unjust portions of liability to less than all of the participants, without whose joint efforts there could have been no liability in the first place.

III. CONTRIBUTION FURTHERS THE BASIC OBJECTIVES OF THE ANTITRUST LAWS

This Court has expressed three basic objectives of section 4 of the Clayton Act, 15 U. S. C. 15. First, it is designed to compensate victims of antitrust violations. Second, it promotes a deterrence of future violations. Third, it deprives violators of the fruits of their illegal acts. ***Illinois Brick Co. v. Illinois,*** 431 U. S. 720, 726 (1977); ***Pfizer Inc. v. Government of India,*** 434 U. S. 308, 314 (1978). Of course, contribution does not affect the first objective since the plaintiff's right to collect from any one or more of the defendants is left unimpaired. However, contribution will increase the deterrent effect of the Clayton Act and, more importantly, only with contribution available among joint wrongdoers will each wrongdoer be de-

prived of the fruits of his illegal acts.

A. Contribution Promotes Deterrence

In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 1968), this Court said that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat *to deter* anyone contemplating business behavior in violation of the antitrust laws." *Id.* at 139 (emphasis added). If there is no right to contribution, those whom the plaintiff chooses not to sue escape all liability, a result totally inconsistent with the Court's pronouncement in *Perma Life*.

The Fifth Circuit's rationale for distinguishing between a no-contribution rule and *Perma Life's* rejection of *in pari delicto* is equally unpersuasive. It said:

> There is an obvious and fundamental difference between a rule that bars suit by a plaintiff who in any way participated in the antitrust violation and a rule that forbids a defendant from obtaining contribution from his fellow wrongdoers. A rule barring any culpable plaintiff diminishes the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly and uncertain antitrust litigation.

604 F. 2d at 902, 903. Although a rule barring any culpable person from filing suit could diminish the deterrent effect of the antitrust laws by reducing the pool of potential private attorneys general who can instigate costly antitrust litigation, so, too, the effect of a rule barring contribution could reduce the scope of available actions against wrongdoers while at the same time unjustly enriching those not sued by the plaintiff.

The Eighth Circuit, in *Professional Beauty Supply*, felt that

a no-contribution rule would dilute the deterrence objective of the antitrust laws:

> To deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing.

594 F. 2d at 1185. The *Professional* Court also observed the possibility that a no-contribution rule might act as a counter-deterrence:

> The fact that one tortfeasor may be held liable for all damages arising from the antitrust violations necessarily means that other joint tortfeasors may go "scot free." This possibility of escaping all liability might cause many to be more willing, rather than less willing, to engage in wrongful activity.

Id. at 1185.

The Fifth Circuit rejected the idea that contribution promotes deterrence, believing instead that greater deterrence is found in the exposure of paying a large judgment without contribution. 604 F. 2d 901. Aside from questions of fair play, however, the deterrence objective is clearly met more efficiently under a rule that insures the certainty that all responsible parties must account for their illegal acts.

Moreover, the denial of contribution could actually bring about a result totally anomalous to the intent of the antitrust laws. Permitting a plaintiff to shift total loss on to less than all participants in an illegal scheme could deter and hinder competition. The magnitude of the burden could result in financial ruin, thereby eliminating some competitors from the market.

B. Contribution Ensures That No One Keeps The Fruits of His Illegal Acts

Without contribution there is no certainty that those who violate the antitrust laws are deprived of the fruits of their illegal conduct. This Court emphasized the importance of this objective in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U. S. 481 (1968):

> In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. ***Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.***

Id. at 494 (emphasis added).

Only where a cause of action for contribution exists does there also exist the certainty that none are unjustly enriched at the expense of the others and the certainty that none will keep their illgotten gains.

C. Contribution Ensures Good Faith Settlements

Without contribution there is no deterrence to the bad faith or sweetheart settlements made for the purpose of, for example, financing the case or obtaining the settling defendants' collusive aid against remaining defendants. Plaintiffs can settle without regard to the relative merits, knowing that as each

defendant settles the rest face ever increasing liability. Companies could thereby be economically compelled to settle and forego their day in court even if they professed innocence.

Encouragement of fair settlements is, of course, an objective in all disputes, not just those under the antitrust laws. With contribution, all parties will know where they stand when considering settlement and, at the same time, all parties will have the appropriate incentives to enter into good faith settlements based upon the merits of the case.

IV. CONTRIBUTION ENSURES AVAILABILITY OF REMEDIES TO PROMOTE PUBLIC POLICY OF THE ANTITRUST LAWS

In *Perma Life Mufflers, Inc. v. International Parts Corp., supra,* the Court was faced with whether plaintiffs in a private antitrust action could be barred from recovery by the *in pari delicto* doctrine. The complaint charged that Midas, Inc. conspired with its parent corporation, International Parts Corp., two other subsidiaries and six individuals in violation of the Sherman and Clayton Acts.

International Parts was a muffler manufacturer. In connection with its nationwide plan to sell mufflers, prospective dealers were offered sales agreements by its subsidiary Midas. The dealers agreed to, among other things, purchase all mufflers from Midas, sell the mufflers at resale prices fixed by Midas and at specified locations, and to refrain from dealing with any of Midas' competition. The petitioners, dealers who had signed the agreement, challenged those provisions as illegal restraints of trade.

Agreeing with the District Court, the Court of Appeals held that the *in pari delicto* doctrine barred the suit, noting that

each of the petitioners had enthusiastically sought the Midas franchise with full knowledge of the provisions, had made enormous profits, had eagerly sought additional franchises and had voluntarily entered into additional franchise agreements while fully aware of the challenged restrictions.

Reversing the Court of Appeals, this Court said:

> We find ourselves in complete disagreement with the Court of Appeals. There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law ***in pari delicto*** doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although ***in pari delicto*** literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have oftern indicated the inappropriateness of invoking broad ***common-law barriers to relief where a private suit serves important public purposes.***

Id. at 138 (emphasis added).

The Court explained that it was for this reason that it had held, in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U. S. 211 (1951), that an antitrust plaintiff could not be barred from recovery by virtue of his engagement in an unrelated antitrust conspiracy and that, in *Simpson v. Union Oil Co.*, 377 U. S. 13 (1964), a dealer whose consignment agreement was cancelled for failure to adhere to a fixed resale price could nonetheless sue, even though by signing the agreement he had become a participant in the illegal scheme. The Court went on to say that:

> Both *Simpson* and *Keifer-Stewart* were premised on a

> recognition that *the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat* to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

392 U. S. at 139 (emphasis added).

In thus rejecting *in pari delicto* as a defense to antitrust claim, the Court made it clear that mere participation in an illegal scheme would not bar the participant from recovering three times the damages he sustained in the course of that participation.

The ruling enunciated in *Perma Life* would not, of course, insulate the petitioners there from liability to any third parties who might have sustained injury as a result of the asserted antitrust violations. Indeed they, together with Midas and the other respondents, could have been subjected to paying three times the damages sustained by any such third party, presupposing a finding of liability. However, in light of the Court's ruling in *Perma Life Mufflers*, would the petitioners there have been denied the right to seek contribution from the Midas respondents had they alone been sued by injured third parties?

If, as this Court stated in *Perma Life Mufflers*, the law encourages a suit by one "no less morally reprehensible than the defendant" in order to "further the overriding public policy in favor of competition", it is difficult to perceive any rationale that would support a rule denying petitioner the right to seek

contribution in a situation where it finds itself the only party sued.

V. APPORTIONMENT OF LIABILITY UNDER A RULE RECOGNIZING CONTRIBUTION

If the Court recognizes a right to contribution under the antitrust laws, it should then consider the manner by which liability will be apportioned among the wrongdoers. Two methods are commonly used in jurisdictions where contribution is an accepted remedy. The same two have been the subject of considerable discussion among antitrust commentators. The first method, consistent with their status as joint tort-feasors, allocates liability equally among the tort-feasors. This method is referred to as *pro rata* or *per capita* 8/ The second method apportions liability on the basis of comparative fault or culpability in the illegal scheme. 9/

An approach to apportionment or division of liability under a rule permitting contribution should consider such factors as the wrongdoer's solidary liability, effect on settlement, effect on deterrence and manageability in litigation.

The precise method of apportionment could, of course, be left to the courts to be determined on a case by case basis,

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8/ The Court in *Professional Beauty Supply* used the term *pro rata*, 594 F. 2d 1182, fn. 4, although it seems clear it meant *per capita*. The two terms appear to be used synonomously in the context of apportionment under contribution.

9/ In this case, if it should be proven that the plaintiff Wilson P. Abraham Construction Co. is entitled to recover damages, either method of apportionment for contribution purposes would appear to produce the same result as all of the alleged co-conspirators were indicted by the grand jury and convicted on pleas of *nolo contendere*.

consistent with all of the relevant factors. There is no compelling reason why, in applying a basically equitable doctrine such as contribution, the courts cannot fashion such appropriate rules of apportionment as are necessary to achieve fairness between the parties while at the same time preserving the manageability of complex litigation.

A. Antitrust Violators Are Solidarily Liable

The relevant starting point in determining a formula for contribution should be the statute itself, and interpretive decisions that make it clear each violator is jointly liable with the others. 10/ As Justice White put it in *Perma Life*, damages ". . . may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with violation; . . ." 392 U. S. 144. Thus, it is plain that as between themselves, each member of an illegal scheme is equally liable to the plaintiff. The act of one is deemed the act of all.

B. Apportionment to Promote Deterrence

The *Pro rata* rule was adopted by the Eighth Circuit in *Professional Beauty Supply*, where the Court based its decision on contribution providing greater deterrence:

> Because of the administrative difficulties of assessing exact percentages of fault in complicated antitrust actions and because we believe a rule of pro rata contribution ***will serve as a more effective deterrent*** to antitrust violations (i.e., under a comparative fault rule

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10/ *Lawlor v. National Screen Service Corp., supra.*

> some parties may feel they have little to lose in joining in an antitrust violation in a minor capacity), we adopt a rule of pro rata contribution except in unusual circumstances.

594 F. 2d at 1182 (emphasis added).

Pro rata apportionment would appear to offer greater deterrence at the inception of the potential violation. Where equally culpable participants are contemplating an unlawful scheme, it makes little difference, from a deterrence standpoint, whether contribution is apportioned on a *pro rata* or comparative culpability basis. The equally culpable participants would be liable for the same amount under either formula.

Under *pro rata* apportionment, one who views himself less culpable, or as a more passive violator, but who faces the prospect of potential exposure equal to that of the arguably more culpable offender, would be strongly deterred from entering the scheme altogether. Under comparative fault apportionment, on the other hand, a participant who views himself as less culpable, or who has some relatively small market power and merely follows the lead of those he views as more culpable and who have large market power, may well be encouraged to go along with the suggested scheme on the theory that he can make money if it works and minimize liability if caught. Deterrence of parties who are arguably less culpable may thus go a long way towards preventing the illegal combination. 11/

11/ This Court recently held that, in admiralty collision cases, *pro rata* division of damages should be replaced by a comparative negligence standard. *United States v. Reliable Transfer Co., Inc.*, 421 U. S. 397 (1975).

C. Effect on Manageability of Litigation

Pro rata apportionment would reduce issues for the courts to resolve and thus avoid increasing the complexity of already complex antitrust litigation. Under such a formula, all parties would know their ultimate exposure at the outset. Aside from the evidence required of the plaintiff to prove liability and injury in the first place, it would be unnecessary for the courts to receive evidence on the participant's respective liabilities as between themselves.

On the other hand, under a comparative fault concept, courts may have to consider many factors in every case in which contribution is sought. The factors might include those suggested by Justice White in his concurring opinion in ***Perma Life***. While discussing circumstances under which he might recognize ***in pari delicto*** as a defense, Justice White said:

> No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal under § 1; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement.

392 U. S. at 146-147.

Such factors would be difficult to measure with any real certainty. Their consideration may be appropriate for determining whether to permit suit by one participant to an unlawful scheme against another and allow him to recover treble damages caused in part by his own actions. It does not necessarily follow that the courts would want to consider them and apportion liability for damages between the participants themselves, each of whom is liable individually for all damages caused by the illegal activities. Evidence of these factors are of no concern to the plaintiff, and would not necessarily be presented in the plaintiff's case. Even if that type evidence, and the determination of comparative fault, were separated from the plaintiff's claim so as not to interfere with his action, it is questionable whether the courts should undertake to referee the percentage of fault to be attributed to each joint antitrust tort-feasor.

Logically, if contribution is apportioned under a comparative basis, the next step would be for defendants in all antitrust cases to call upon the courts to referee, and apportion as between themselves, the relative responsibility for payment of a judgment. Thus, even where a plaintiff sues all participants in an illegal scheme, the courts will be called upon to sort out the various facts necessary to a determination of comparative fault, and to allocate the percentage each defendant must pay. The defenses that could be expected to be asserted to determine relative liability among participants will be limited only by the imagination of defense counsel.

D. Effect on Settlement

An important question to be considered within the framework of how to apportion damages under a rule permitting contribution is the effect on settlement. A contribution rule should be formulated that will not adversely affect settlements.

Plaintiffs must know the value of what they are releasing and settling defendants must be relieved of any further liability.

Application of a rule that reduces the claim of a plaintiff who settles with one of multiple defendants by the settling defendant's *pro rata* share, and releases the settling defendant from any further liability, achieves the desired effect on settlement. The plaintiff will know, without the need to conduct extensive discovery, the maximum cost of settlement. If the facts show eventually that there are more wrongdoers than was thought at the time of settlement, the plaintiff is benefited since percentage reduction of ultimate recovery is thus reduced.

As the plaintiff is obligated to prove the existence of the illegal conspiracy, impact and damages in the first place, which would identify its participants, no new evidence need be presented to the courts. Apportionment under this rule should not conflict with jurisprudence that allows the plaintiff to recover the entire judgment from any one or more of the tort-feasors. It is merely a method of apportioning contribution among non-settling defendants.

Conversely, division of contribution upon a concept such as comparative fault could be more difficult for a plaintiff, or defendant, to quantify, and thus more likely to present obstacles to settlement. In order to know just what was being released, plaintiffs would have to measure the relative culpabilities of the defendants, which would require substantial evidence, and might not be ascertainable until after the trial itself.

VI. CONTRIBUTION SHOULD BE AVAILABLE AMONG BOTH INTENTIONAL AND UNINTENTIONAL VIOLATORS OF THE ANTITRUST LAWS

There is no reason to make a distinction between so-called intentional and unintentional violators of the antitrust laws when considering contribution. At the outset, it is difficult to come to grips with a workable definition of intentional or unintentional within the antitrust context. Courts might have to apply concepts akin to the sort of intent required for criminal convictions. See *U. S. v. Gysum Co.*, 438 U. S. 422 (1978).

A rule of contribution based upon intent would inevitably increase the complexity, and thus the cost, of antitrust litigation. As distinguished from the criminal intent the Court found to be a prerequisite to conviction in *U. S. v. Gypsum Co., supra,* civil liability under the price fixing provisions of the Sherman Act is based upon actions that have either the purpose or the effect of stabilizing prices. *McLain v. Real Estate Board of New Orleans Inc.*, 100 S. Ct. 502 (1980). *U. S. v. Container Corp.*, 393 U. S. 333 (1969). Thus, some definitions of intent would have to be formulated, and evidence thereof presented, all of which would necessitate a more complex trial. It could be difficult for the courts to decide, or agree upon, what type behavior is sufficiently intentional or unintentional to fix appropriate responsibility.

Aside from the difficulty of formulating rules on the question of intent, there is no basis for applying such a distinction, for neither the Sherman nor Clayton Acts make such a distinction. The Clayton Act speaks in terms of the amount of recovery a plaintiff may achieve, not in terms of the amount a defendant must pay, or what type of wrongdoer can be liable.

As aforesaid, it has been recognized by the Court that antitrust violators are joint tort-feasors in the conspiracy to which

they are a party. *Lawlor v. National Screen Service Corp., supra.* It has also been held that a plaintiff is not required to sue all co-conspirators but may, instead, choose to proceed against any one or more of them. *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F. 2d 967 (7th Cir. 1944), *cert. den.* 321 U. S. 792 (1944). In *Twentieth Century-Fox Film Corp. v. Goldwyn*, 328 F. 2d 190 (9th Cir. 1964), *cert. den.* 379 U. S. 880 (1964), recovery was permitted from a participant in an illegal conspiracy for damages caused by activities in which the defendant neither participated nor benefited.

The Fifth Circuit has observed that an antitrust action is in the nature of a tort action, that the defendants are jointly and severally liable, and that the fact that actual damages caused by certain defendants is proportionately small does not diminish their liability. *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F. 2d 389, 392 (n. 4) (5th Cir. 1976).

Where no distinction has been made as to the primary liability of a defendant to a plaintiff based upon whether a defendant has acted intentionally or unintentionally, no such distinction should be made when considering contribution.

CONCLUSION

Petitioner, Texas Industries, Inc., respectfully requests the Court to reverse the judgment of the Court of Appeals for the Fifth Circuit and to remand the case to the district court for further proceedings with instructions to recognize petitioner's right to contribution under the antitrust laws.

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Respectfully submitted,

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